IN THE

Supreme Court of the United States

October Term, 1948
No. 446

WILLIS ALLEN, ROY G. OWENS, and CAMPAIGN COMMITTEE FOR CALIFORNIA BILL OF RIGHTS INITIATIVE CONSTITUTIONAL AMENDMENT, INC., a corporation,

Petitioners,

vs.

ARTHUR JAMES MCFADDEN and FRANK M. JORDAN as Secretary of the State of California,

Respondents.

Petition for Writ of Certiorari to the Supreme Court of the State of California and Brief in Support Thereof.

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vs.

ARTHUR JAMES MCFADDEN and FRANK M. JORDAN as Secretary of the State of California,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Petitioners pray that a Writ of Certiorari issue to review a peremptory writ of mandate issued by the Supreme Court of the State of California on Sept. 3, 1948, pursuant to an opinion of said court dated Aug. 3, 1948.

Statement of Matter Involved.

Petitioners had succeeded in qualifying a proposed initiative constitutional amendment for the general election ballot of Nov. 2, 1948. This had been accomplished by securing 273,549 signatures of registered qualified electors in California to an initiative petition. All of the mechanical and procedural requirements of the state constitution and laws on the subject of Initiative were complied with, and are not involved in this petition.

But after the Secretary of State of the State of California had made his formal announcement that the proposed initiative constitutional amendment had qualified for the ballot, the respondent McFadden applied directly to the Supreme Court of the State of California and obtained a peremptory writ of mandate ordering the respondent Secretary of State not to place the proposed amendment on the ballot or to submit it to the vote of the people.

The petitioners had qualified the proposed constitutional amendment for the ballot under the Initiative provisions of Article IV, Section 1 of the State Constitution adopted in 1911 which provide that the legislative power of the state is vested in the Legislature but that "the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature"; and also reserve the power, to reject by referendum any act passed by the Legislature.

Respondent McFadden sought and obtained the peremptory writ of mandate which prevented the proposed amendment from appearing on the ballot on the ground that it was "revisory" in nature rather than "amendatory," and therefore could only be submitted in accordance with

another article of the State Constitution, namely Article XVIII, Section 2, adopted in 1879.

Article XVIII, Section 2 of the State Constitution, in three separate and distinct places, in its own language, shows with unmistakable clarity that the "revision" referred to therein is only such a revision undertaken under the provisions of said Article XVIII where one entire constitution is substituted for the entire constitution then existing.

Admittedly, the constitutional amendment proposed by the petitioners under the newer Initiative provisions of Section IV of the State Constitution, did not purport to be and actually was not, the substitution of one entire constitution for another. It did not change the form of government. Many of the provisions of the existing constitution were entirely untouched; some of them were slightly altered; while the taxation provisions were materially altered.

But "tyrants always find a pretext for their tyranny." The respondent McFadden prevailed in his contention that the proposed amendment was a "substantial revision" despite the state court's legal duty to uphold the initiative process, and notwithstanding the fact that every intendment of the law is in favor of the people and the initiative.

The writ of mandate ignores Article IV, Section 1 (the initiative provisions) of the State Constitution and prevents the people from using its plain provisions. In effect, it deprives the people of the use and benefit of the principle placed by the people in their constitution by which they reserved to themselves the power to "propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature."

The respondent McFadden, if not prevented by this court, will usurp the people's legislative powers, and the judiciary will become the censor of those measures which the people may be permitted to vote upon.

The writ of mandate constitutes a reversal of a former decision of the state court in 1938 which permitted the submission to the electorate of a somewhat similar proposed constitutional amendment containing more than one subject matter. See *Brown v. Jordan*, 12 Cal. 2d 75, 82 P. 2d 450. The writ of mandate nullifies important constitutional rights upon which the people have relied in the past and upon which they must rely in the future.

Hereafter in each individual case as presented (after old people have trudged the streets and secured the hundreds of thousands of signatures required and spent their money on the other necessary expenses of a campaign for signatures) there will remain the constant peril of adverse judicial determination as to how many subjects could have been included in any given proposed initiative constitutional amendment.

In other words, unless petitioners prevail, the judiciary will control all future direct legislation.

Petitioners contend that a restriction on the power to propose multi-subject amendments, imposed by a principal (the people) upon its agent (the legislature) cannot be interpreted to bind the principal when it chooses to act independently of the agent.

Finally, petitioners contend that where the people's right to exercise their expressly reserved legislative powers are usurped, then to that extent the people are deprived of a republican form of government guaranteed them by the federal constitution.

The untrammeled use of the initiative by which the people may make laws and amend their state constitution at the polls *independent of the Legislature* is an integral and important component part of the republican form of government in California. And this is particularly so, in a state where for 14 years the Legislature has blocked the calling of a constitutional convention, to revise the constitution, despite a popular vote in favor of such a convention.

> "In 1933 the Legislature submitted the question of calling a constitutional convention to the voters. (Assembly Concurrent Resolution No. 17.) This proposal received a vote of 705,915 for to 668,080 against. . . . The Legislature finally took no action." Page 322 of Constitutional History of California, compiled by Paul Mason for the California State Senate, 1947.

Petitioners rely upon the doctrine of *Obsta Principiis*. We must withstand and oppose the beginnings of tyranny. We must resist the first approaches or encroachments by the judiciary upon the legislative rights of the people. The people are not required to wait until all of the elements of a republican form of government have been swept away or usurped, before they may complain that a republican form of government is not being maintained. If the people wait that long, there might be no tribunal to which we could complain.

Petitioners respect the language of Justice Bradley in *Boyd v. U. S.*:

> "It is the duty of courts to be watchful for the constitutional rights of the citizens, and against any stealthy encroachments thereon. Their motto should be *'Obsta principiis.'*" (116 U. S. 616, 635, 6 Sup. Ct. 535, 29 L. Ed. 746.)

Here is a cry that springs from the people, from the very grass roots. It should not go unheeded, lest the people's spirit be broken, lest they become disillusioned, cynical, embittered, left without the will to resist encroachments upon democracy.

Petitioners ask this court to hear the people's plea, to grant this application for writ of certiorari to the Supreme Court of the State of California, to hear in open court the people's case.

Statement as to Jurisdiction.

The jurisdiction of this Court is based upon 28 U. S. C. A. 1257; the Constitution of the United States, Article IV, Section 4 which guarantees a republican form of government; the 9th and 10th Amendments to that Constitution; and 8 U. S. C. A. 43, Section 1979 Revised Statutes which gives a cause of action to every person who "under color of any statute, ordinance, regulation, custom or usage, of any state" has been deprived of any right, privilege or immunity secured by the Constitution.

The right of the citizens of California to use and enjoy their reserved political powers is at stake. If, by any pretext, the citizens are prevented from the exercise of those

rights which the citizens of California have expressly reserved as an integral part of a republican form of government in California, then a republican form of government is not being maintained, and the citizens' only recourse is to this Court.

The writ of mandate in this case prevents popular action upon the proposed initiative constitutional amendment by means of the initiative provisions of the state constitution. If the writ is left undisturbed then, indeed, the people of California are helpless.

It is no answer to tell the people they still have the right to replace the members of the Legislature. The people should not be forced to turn back the political clock to the period before 1911 when the Initiative provisions of the state constitution were adopted.

> "The chief reason for the spread of direct legislation in the United States is to be found in the impatience of the people with the work of their state legislatures. By reason of the lack of authoritative leadership, the persistent lobbying on the part of special interests and the intermittent control of legislative bodies by political bosses a great deal of dissatisfaction with the work of these legislatures developed during the closing years of the 19th century. People came to the conclusion that by their own direct action they could hardly do worse and might do better. Consequently they took into their own hands the power to make and to reject laws not as a procedure for every day use, but merely as a method to be used when the desired results could not be had in any other way." William B. Munro Vol. 8 Encyclopedia of the Social Sciences 51.

Are the people of California to be told all over again that the people's only remedy is to change the members of the Legislature? That is precisely the reason the people took back from the Legislature the exclusive power to initiate legislation. Unless this petition is granted, the people will be deprived of the use of one of the essential component parts of that which the people have ordained as a republican form of government in California. Petitioners must, and do look now to the federal guarantee.

Ours is a government of delegated powers, with the people reserving and exercising the powers of the sovereign. (9th and 10th Amendments of the Constitution.) The delegated powers are conferred upon the three distinct branches of government, with each independent of the others. Under the doctrine of separation of powers, which arises out of the central premise that each branch of government is independent, no branch of the government may directly or indirectly attempt to control or interfere with the exercise of powers delegated to other branches.

If the people are to retain their sovereign power as reserved by the Ninth and Tenth Amendments—their independence as a part and as the source of all government—then the principles underlying the doctrine of separation of powers must be applied to strike down any attempt of the judiciary to interfere with the otherwise lawful exercise by the people of their legislative functions.

After a law has been enacted, or after an amendment has been adopted, the judiciary may hold a part or all of it to be unconstitutional. That is its right; that is its duty in a proper case. But the judiciary may not limit

or give orders even to the Legislature upon what laws it may vote. Much less may the judiciary forbid the people, the sovereign, to vote upon any amendments the people may choose to propose. Objections by the judiciary to the substance of the law or amendment may only be expressed after adoption—not before. To do so is to trench upon the reserved powers of the people.

When the late Chief Justice Stone called for the exercise of judicial self-restraint he said: "For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government." *U. S. v. Butler*, 297 U. S. 1, 79.

By this petition this Court is called upon not to strike down a state law, but to restore to the people the right to the ballot and to the democratic processes reserved to them.

The word "Republican" breaks down into two Latin words. "Re" meaning "back to"; and "Publicus," from "populous" meaning "the people." Hence a republican form of government means a government with a form which goes back to the people.

In *Chisholm v. Georgia*, 2 Dall. 419, 1 L. Ed. 440, Wilson, J., said:

> "As a citizen, I know the government of that state (Georgia) to be republican; and my short definition of such a government is—one constructed on this principle, that the supreme power resides in the body of the people."

Nov. 2, 1948, the day upon which California Bill of Rights initiative constitutional amendment was entitled to appear upon the California ballot, has come and gone. But the framers of the Initiative provisions of the California State Constitution had foresight. They knew that attempts would be made to thwart a vote upon qualified initiative measures. Therefore, they wisely provided that "if for any reason any initiative or referendum measure proposed by petition as herein provided, be not submitted at the election specified in this section, such failure shall not prevent its submission at a succeeding general election. . . ." (Art. IV, Sec. 1.)

A decision by the Supreme Court of the United States that the measure was entitled to be and should have been on the ballot of Nov. 2, 1948, would right the wrong that has been done; it would place it on the next general election ballot, Nov. 7, 1950.

Statutes Involved.

The statutes involved are California Constitution, Article IV, Section 1; Article XVIII, Sections 1 and 2; Article I, Sections 2 and 3 Constitution of the United States, Article IV, Section 4, and the 9th and 10th Amendments; 8 U. S. C. A. 43, Section 1979; 28 U. S. C. A. Sec. 1257.

The text of these statutes, or such portions thereof as are applicable, are set forth in the Appendix to this Petition.

Questions Presented.

(1) Does removal from the ballot of the proposed initiative constitutional amendment deny to the petitioners any of their constitutional rights under Article IV, Sec. 4, and under the 9th and 10th Amendments of the Constitution of the United States; and under 28 U. S. C. A. 1257, and 8 U. S. C. A. Sec. 1979?

(2) Does the state court decision deny to petitioners their right to the exercise and enjoyment of the people's reserved legislative powers?

(3) Does the decision of the state court constitute a denial of a republican form of government when it prevents petitioners and the people from using their reserved legislative powers?

Respectfully submitted,

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Supreme Court of the United States

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Respondents

BRIEF IN SUPPORT OF PETITION.

Petitioners' argument to this court, in support of this petition for writ of certiorari, is more fully stated in that portion of the record entitled "Interveners' Answering Memorandum of Points and Authorities" and petitioners respectfully direct this court's attention to same.

The writ of mandate attacked by this petitioner has interfered with the legislative powers which the people have reserved to themselves, including the right of the people to amend the state constitution "at the polls independent of the legislature."

Just as no one of the three branches of government may be permitted directly or indirectly to use their delegated

power in such a manner as to interfere to any degree with the exercise of power elsewhere deposited, they may not invade the legislative powers of a self-governing people. To do so is to violate the 9th and 10th admendments of the constitution, and to deprive the people of the guarantee of a republican form of government.

The heart of our constitutional system is found in the proposition that each branch of the government must be free from the domination, control, or interference of any other branch of the government. Out of this concept has developed the doctrine of separation of powers.

This doctrine has been applied to the three branches of government in order to insure the independence of each branch. The "checks and balances" to be exercised by each branch against the others, which were so much relied upon by the framers of our constitution, could only be accomplished by independent agencies; a subjugated executive could scarcely check a dominating congress and a frightened judiciary could not resist an aggressive president. Genuine independence requires freedom from invasion by other agencies.

In the case of *O'Donoghue v. United States,* 289 E. S. 516, holding that the legislature could not reduce salaries because such power would provide the means for its control of the judiciary, the court said:

> "If it be important thus to separate the several departments of government and restrict them to the exercise of their appointed powers, it follows, as a logical corollary, equally important, that each department should be kept completely independent of the others—independent not in the sense that they shall not cooperate to the common end of carrying into ef-

fect the purposes of the Constitution, but in the sense that the *acts of each shall never be controlled by or subjected, directly or indirectly, to the coercive influence of either of the other departments.* James Wilson, one of the framers of the Constitution and a justice of this court, in one of his law lectures said that the independence of each department required that its proceedings '*should be free from the remotest influence, direct or indirect, of either* of the other two powers.'" (See also *Humphries Executors v. United States,* 295 U. S. 602; *Bailey v. Drexel Furniture Co.,* 259 U. S. 20; *United States v. Owlett,* 15 Fed. Supp. 736.)

The writ of mandate obtained by the respondent McFadden invades the area of government reserved to the people by the 9th and 10th amendments when it prevents the exercise by the people of their reserved legislative powers to vote upon the proposed initiative constitutional amendment.

Under the federal constitution the judiciary may exercise only its judicial power; the remaining governmental powers are exercised by the legislative or executive branches or reserved to the states and the people. *The 9th and 10th amendments to the constitution of the United States.*

Article I, Section 3 of the California constitution says:

"The State of California is an inseparable part of the American union, and the Constitution of the United States is the supreme law of the land."

Article I, Section 23 of the Constitution of California says:

> "This enumeration of rights shall not be construed to impair or deny others retained by the people."

The people hold a two-fold position. They are the sovereign, the source of all delegated governmental powers; at the same time they, as the sovereign, perform essential and separate governmental functions.

In California one of the governmental functions reserved to and exercised by the people is its legislative function to "propose laws and amendments of the constitution, and to adopt or reject the same, at the polls, independent of the legislature."

As the sovereign, the people reserved to themselves and to the state the powers not delegated to other branches of government. The 9th and 10th amendments were adopted to make explicit what was already implicit.

The critical balance between limitless power, which is tyranny, and a constitutional democracy (a republican form of government), can be maintained only by constant popular supervision, and then only if the people can exercise, and are permitted to exercise, their governmental powers without obstruction or interference by the agencies supervised.

If any of the branches exercising delegated powers oversteps its authority, the power and opportunity for correc-

tion remains in the people; but if the power of the people as a sovereign is invaded, a republican form of government disappears.

> It would be an abuse of judicial power for the court *to attempt to interfere* with the constitutional discretion of the legislature. *Bridge Co. v. U. S.*, 105 U. S. 470, 482 (See also *Yick Wo v. Hopkins*, 118 U. S. 356; *Grosjean v. American Trust Co.*, 297 U. S. 233; *United States v. Cruikshank*, 92 U. S. 542; *Spier v. Baker*, 120 Cal. 370, 379; *Thomas v. Collins, supra*, 323 U. S. 516, 545; *City of Chicago v. Tribune Co.*, 139 N. E. 86, 28 A. L. R. 1368.)

If the judiciary may not even attempt to interfere with the legislature, then how much less may the judiciary attempt to interfere with the legislative functions of the people?

> "Libanius says, that at 'Athens a stranger, who intermeddled in the assemblies of the people, was punished with death.' This is because such a man usurped the rights of sovereignty." (Montesquieu, Spirit of Laws (Cincinnati 1873) Vol. 1, p. 10.)

If it is necessary that the branches of the government, having only delegated authority, remain independent (doctrine of separation of powers), can it be doubted that it is essential that the people exercising reserved sovereign powers retain complete independence? Otherwise, an agency possessing only delegated authority would be free to suppress the sovereign powers of the people.

Conclusion.

For the reasons above, and for the reasons set forth more fully in that portion of the record entitled "Interveners' Answering Memorandum of Points and Authorities," the petitioners respectfully request the issuance of the Writ of Certiorari.

Respectfully submitted,

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APPENDIX.

Statutes Involved.

California Constitution, Article IV, Section 1. "Legislative Department. Legislative Power Vested in Senate and Assembly. Section 1. The legislative power of this State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature . . ."

"If for any reason any initiative or referendum measure, proposed by petition as herein provided, be not submitted at the election specified in this section, such failure shall not prevent its submission at a succeeding general election . . ."

Article XVIII. Amending and Revising the Constitution. Constitutional Amendments. Section 1. "Any amendment or amendments to this Constitution may be proposed in the Senate or Assembly, and if two-thirds of all the members elected to each of the two houses shall vote in favor thereof, such proposed amendment or amendments shall be entered in their Journals, with the yeas and nays taken thereon; and it shall be the duty of the Legislature to submit such proposed amendment or amendments to the people in such a manner, and at such time, and after such publication as may be deemed expedient. Should more amendments than one be submitted at the same election they shall be so prepared and

distinguished, by numbers or otherwise, that each can be voted on separately. If the people shall approve and ratify such amendment or amendments, or any of them, by a majority of the qualified electors voting thereon such amendment or amendments shall become a part of this constitution."

Section 2. "Whenever two-thirds of the members elected to each branch of the Legislature shall deem it necessary to revise this Constitution, they shall recommend to the electors to vote at the next general election for or against a convention for that purpose, and if a majority of the electors voting at such election on the proposition for a convention shall vote in favor thereof, the Legislature shall, at its next session, provide by law for calling the same. The convention shall consist of a number of delegates not to exceed that of both branches of the Legislature, who shall be chosen in the same manner, and have the same qualifications, as members of the Legislature. The delegates so elected shall meet within three months after their election at such place as the Legislature may direct. At a special election to be provided for by law, the Constitution that may be agreed upon by such convention shall be submitted to the people for their ratification or rejection, in such manner as the convention may determine. The returns of such election shall, in such manner as the convention shall direct, be certified to the Executive of the State, who shall call to his assistance the Controller, Treasurer, and Secretary of State, and compare the returns so certified to him; and it shall be the duty of the Executive to declare, by his proclamation, such Constitution, as may have been ratified by a majority of all the votes cast at such special election, to be the Constitution of the State of California."

Article I. Sec. 2. Purpose of Government. "All political power is inherent in the people. Government is instituted for the protection, security and benefit of the people, and they have the right to alter or reform the same whenever the public good may require it."

Article I, Sec. 3. United States Constitution Supreme Law. "The State of California is an inseparable part of the American Union, and the Constitution of the United States is the supreme law of the land."

Constitution of the United States, Article IV, Section 4. "1. The United States shall guarantee to every State in this Union a republican form of government, and shall protect each of them against invasion; and on application of the Legislature, or of the executive (when the Legislature cannot be convened) against domestic violence.

Ninth Amendment. Section 1. "The enumeration in the Constitution, of certain rights shall not be construed to deny or disparage others retained by the people."

Tenth Amendment. Section 1. "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

8 U. S. C. A., Sec. 43. Civil action for deprivation of rights. Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any state or territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction

thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. R. S., Sec. 1979.

28 U. S. C. A., Sec. 1257 (3). Final judgment or decrees rendered by the highest court of a state in which a decision could be had, may be reviewed by the Supreme Court as follows: (3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question on the ground of its being repugnant to the constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States.

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Respondents.

BRIEF OF RESPONDENT McFADDEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

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BRIEF OF RESPONDENT McFADDEN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA.

STATEMENT OF THE CASE.

Action of the State Court.

The court below, the Supreme Court of the State of California, in *McFadden v. Jordan,* 32 A.C. 355, 196 P. (2d) 787 (Tr., pp. 111-133), held that the proposal in an initiative petition (Tr., pp. 14-26) was an attempted revision of the State Constitution, rather than amendment thereof, and that since the State Con-

stitution provides for its revision only by a constitutional convention, but makes no provision for revision by initiative, the proposal was not entitled to a place upon the ballot. The pertinent provisions of the State Constitution relating to revision are contained in its Article XVIII, Section 2. (Appendix hereto, page ii.) Those relating to initiative amendment of the State Constitution are contained in its Article IV, Section 1, the relevant portions of which appear in the Appendix hereto commencing at page i.

The Supreme Court of California issued a peremptory writ of mandate commanding the Secretary of State of the State of California to refrain from submitting the initiative to the electors of the State. (Tr., p. 133.) It is this action of the State Supreme Court which the petitioners seek to have this Court review.

The Initiative Measure Involved.

The petitioners here were proponents of an initiative proposal designated by them as the "California Bill of Rights". A proposed initiative constitutional amendment, it was exceedingly multifarious. In part: It would have made the State Constitution enunciate the sundry ethical, economic and political pronouncements of its proponents (Tr., p. 14); it would have created a powerful new branch of the State government, a so-called "Pension Commission", and installed five named individuals as the commissioners for six-year terms (Tr., p. 15); it would have set up an elaborate system of pension and other payments involv-

ing classification of citizens (Tr., p. 16); it would have legalized wide varieties of gambling under the control of the "Pension Commission" (Tr., pp. 17-20); it would have eliminated, both for the state and for all its political subdivisions, any source of tax revenue except a tax of "$2 per $100 of gross income" (Tr., pp. 20-21); it would have placed regulation of healing arts under another powerful commission, the "California State Board of Naturopathic Examiners", mandatorily installing five named individuals as the first members of that board (Tr., pp. 21-24); it would have required re-apportionment of the State Senate, prohibited cross-filing in primary elections and fixed the method of choosing committees of the State legislature (Tr., pp. 24-25); it would have regulated public lands and inland waters, as well as various types of mining (Tr., pp. 25-26); it would have prohibited legislation touching upon any matter covered by the measure, repealed any existing State constitutional provisions in conflict with it (Tr., p. 26); and it would have made court decisions "adversely, or at all", affecting either the measure or its administration subject to popular vote and ineffective until approved by a majority vote of the electors of the State "at the next general election which occurs subsequent to 130 days after any such decision or order shall become final". (Tr., p. 26.)

Respondent's Statement of the Questions Presented.

1. Do petitioners have the interest requisite to invoke the jurisdiction of this Court?

2. Have all matters here before the Court been rendered academic by the initiative amendment of the California Constitution, adopted by the electorate on November 2, 1948, and now in effect, which provides that no initiative constitutional amendment "shall hereafter be submitted to the electors if it embraces more than one subject, nor . . . become effective for any purpose."?

3. Does the highest court of a state deny any Federal right to proponents of a purported initiative constitutional amendment by deciding that their measure is an attempted revision of the State Constitution not sanctioned by its provisions governing the initiative process in that State?[1]

Summary of Argument.

1. Since there are here no personal or private rights of petitioners to be vindicated, they are but self-constituted spokesmen "of a constitutional point of view" and cannot invoke the jurisdiction of this Court.[2]

---

[1]The claim of petitioners that it does appears chiefly to be grounded in Article IV, Section 4, of the Constitution of the United States, which provides that the United States shall guarantee to every state in the union a republican form of government. Petitioners also contend that the construction put upon the State Constitution by the State court violates, in some unspecified way, rights guaranteed to them by the Ninth and Tenth Amendments to the Constitution of the United States, as well as by the Federal Civil Rights Statute, 8 U.S.C.A., Sec. 43.

[2]Paraphrasing and quoting in part *Coleman v. Miller*, 307 U.S. 433 at 467, post.

2. The petition invites this Court to perform an idle act in view of the amendment to the California Constitution which became effective December 15, 1948, and now prohibits submission to the electorate of any initiative constitutional amendment embracing more than one subject and further provides that no such amendment shall become effective for any purpose.

3. Whatever rights petitioners have spring from the provisions of the Constitution of the State of California which create and control the initiative in that State. The question as to whether a particular initiative measure is sanctioned by those State constitutional provisions is local and its final determination by the State court is conclusive.

4. The privilege of the proponents of a State initiative measure to obtain its submission to the State electorate is not guaranteed by Article IV of the Constitution of the United States nor by any other provision thereof nor by any Federal statute.

Argument.

I. THE PETITIONERS LACK THE REQUISITE PERSONAL OR PRIVATE INTEREST TO INVOKE THE JURISDICTION OF THIS COURT.

Contrary to the implications of the argument of petitioners here, they speak neither for the people of the State of California as a whole, nor for the entire State electorate, nor for any substantial portion

of either. The fact is quite otherwise. The proponents of the State initiative—three individuals and a corporation—are here insisting that they have Federal rights under which they may compel the entire electorate to pass upon their proposal.

They are not officials of the State government. Indeed, there is no evidence in the record that they are even qualified voters of the State of California.[3] If none of the petitioners is at least a qualified voter of the State of California, they have no standing here.

Assuming, *arguendo,* that the individual petitioners are qualified voters under the laws of the State, do they then have any standing here? The decisions of this Court indicate that they do not. The Governor and other officers of the State of Indiana, seeking review of a decision of the Supreme Court of that State forbidding submission to the electorate of a new State constitution, were, in *Marshall v. Dye,* 231 U.S. 250, declared to have no personal rights before this Court sufficient to invoke its review of the decision of the State court. In *Coleman v. Miller,* 307 U.S. 433, Mr. Justice Frankfurter, expressing the views of Mr. Justice Roberts, Mr. Justice Black and Mr. Justice Douglas, as well as his own, pointed out that legislators of the State of Kansas lacked the personal or private interest requisite to invoke certiorari to the

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[3]Petitioner Owens declares at the outset of an affidavit filed with the court below that he "is a resident of the County of Los Angeles and has resided in the State of California for the past 19 years". (Tr., p. 54) Even such inferences as might be made from this do not apply to petitioner Willis Allen and obviously do not apply to the corporate petitioner.

Supreme Court of the State of Kansas on its decision as to ratification by the Kansas legislature of the Child Labor Amendment (*Coleman v. Miller,* supra, 307 U.S. 433, commencing at page 460), Mr. Justice Frankfurter stating that

> "... The requisites of litigation are not satisfied when questions of constitutionality though conveyed through the outward forms of a conventional court proceeding do not bear special relation to a particular litigant. The scope and consequences of our doctrine of judicial review over executive and legislative action should make us observe fastidiously the bounds of the litigious process within which we are confined ..." (307 U.S. at 462-4.)

and that

> "We can only adjudicate an issue as to which there is a claimant before us who has a special, individualized stake in it. One who is merely the self-constituted spokesman of a constitutional point of view can not ask us to pass on it ..." (307 U.S. at 467.)

The cited cases are recent expressions of the settled rule of this Court (subject to narrow exceptions not here applicable) that

> "... in every case coming to the Supreme Court, whether invoking the exercise of its original jurisdiction or seeking review of the decision of state or lower federal court, it is a jurisdictional prerequisite that the Supreme Court be satisfied that the suit involves the vindication of rights personal to the parties thereto, which are en-

titled to and susceptible of protection by judicial action in that proceeding, and which are being invaded, or the invasion of which is certain and impending.

"No one is immune from making this jurisdictional showing. The sovereign, the individual, the corporation, the unincorporated association—each alike must establish its personal interest and status to invoke the exercise of the federal judicial power in the particular controversy before the Supreme Court. That Court is itself the judge whether the requirement is met: it is not controlled either by ruling or assumption upon this point by the court below, whether state or federal tribunal. Since the requirement is jurisdictional, it will be raised by the Court *sua sponte* when ignored by the parties."

Jurisdiction of the Supreme Court of the United States, Robertson and Kirkham, 1936, pp. 469-71. (Citations omitted.)

It is a fair presumption, of course, that petitioners here are not acting from purely eleemosynary purposes, but nowhere does it appear that they have the requisite personal or private interest to invoke the jurisdiction of this Court.

II. PETITIONERS SEEK THE PERFORMANCE OF AN IDLE ACT BY THIS COURT SINCE THE ADDITION OF SECTION 1c TO ARTICLE IV OF THE CALIFORNIA CONSTITUTION, RECENTLY ENACTED BY THE PEOPLE, NOW AND HEREAFTER PROHIBITS THE SUBMISSION OF ANY INITIATIVE AMENDMENT EMBRACING MORE THAN ONE SUBJECT.

Although the election of November 2, 1948, at which petitioners planned to have their purported constitutional amendment submitted, has been held, petitioners state that a decision in their favor by this Court "would place it on the next general election ballot, Nov. 7, 1950." (Petition, p. 10.) They ground this conclusion in that language of the State Constitution (a portion of the 1911 amendment establishing the initiative process) which reads that "if for any reason any initiative or referendum measure proposed by petition as herein provided, be not submitted at the election specified in this section, such failure shall not prevent its submission at a succeeding general election . . ." (Petition, p. 10.)

But whether or not the questioned mandamus was properly issued and whether or not the purported initiative proposition could have been submitted if the mandate were dissolved has now become an academic question.

It has been rendered so by the action of the people of California in amending their Constitution at the general election of November 2, 1948, to add the following Section 1c of Article IV:[4]

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[4]Shortly after the widely publicized decision of the California Supreme Court here attacked, this amendment was adopted by a vote of 1,973,761 to 963,387. Pursuant to a provision of Article

"Sec. 1c. Every constitutional amendment or statute proposed by the initiative shall relate to but one subject. No such amendment or statute shall hereafter be submitted to the electors if it embraces more than one subject, nor shall any such amendment or statute embracing more than one subject, hereafter submitted to or approved by the electors, become effective for any purpose."

There can be no question but that petitioners' so-called California Bill of Rights embraces more than one subject. The most casual examination will confirm it. Petitioners, as intervenors below, admitted it. (Tr., pp. 89, 91, 99.)

Article IV, Section 1c, quoted above, is, of course, the latest amendment to the California Constitution upon the subject with which it deals. Therefore, it prevails over the earlier 1911 amendment of the State Constitution upon which petitioners rely.[5] The practical effect of the new amendment, overwhelmingly adopted by the State electorate, is that neither respondent Secretary of State nor any other State official now has the power to submit petitioners' so-called Bill of Rights, even if the State Supreme Court should dissolve the writ of mandate. Nor can that Court, a creature of and bound by the State Constitution, now have any power to issue a positive man-

IV, Section 1 (Appendix, p. i), the amendment became effective on December 15, 1948, five days after the official declaration of the vote by the Secretary of State of California.

[5]Cases supporting this elementary doctrine are collected in 16 *C.J.S.* p. 67, Footnote 39.

date for submission to the electorate of petitioners' proposal embracing so many unrelated subjects.

It is clear that the people of the State of California do not share the views of petitioners as to the desirability of multifarious initiative constitutional amendments. Their overwhelming vote, in addition to rendering the present petition purposeless, has the effect of turning against petitioners themselves whatever force may lie in the thesis of petitioners' entire argument, i.e., that the will of the people must not be thwarted by the courts. Article IV, Section 1c, expresses the will of the California electorate, not the desire of any "self-constituted spokesman of a constitutional point of view."[6]

III. NO FEDERAL QUESTION IS PRESENTED BY THE PETITION FOR CERTIORARI.

A. Whether or not the proponents of a state initiative constitutional amendment have complied with the controlling provisions of a state constitution is a matter for final determination by the state court of last resort.

The initiative process here involved is entirely a creature of the California State Constitution. The scope of the initiative power and the manner of its exercise are delineated by that constitution. Whatever rights petitioners have in this proceeding stem from it and it alone.

As a matter of State law, it is well settled (and was well settled long prior to the activities of petitioners

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[6]*Coleman v. Miller,* 307 U.S. 433, 467, supra.

in behalf of their so-called California Bill of Rights) that the State Supreme Court had and has the power to exclude from the ballot initiative proposals found not to comply with constitutional or statutory provisions governing the California initiative. In *Gage v. Jordan,* 23 Cal. (2d) 794, 147 P. (2d) 387, the State Supreme Court prohibited an initiative constitutional amendment from being submitted to the State electorate on the ground that the constitutional requirements for submission were not met. In *Clark v. Jordan,* 7 Cal. (2d) 248, 60 P. (2d) 457, the same court ruled similarly as to an initiative measure because of the failure to comply with a State statute supplementing the State Constitution in its provisions regarding exercise of the initiative. In *Mayock v. Kerr,* 216 Cal. 171, 13 P. (2d) 717, the same court sustained a refusal of a county registrar of voters to file initiative petitions failing to meet formal requirements designated in the State Constitution.

Here, as in the cited cases, the California Supreme Court has done no more than to measure an initiative proposal against the requirements of the State law governing exercise of the privilege created by State law and found the proposal wanting. No more than interpretation and application of the State Constitution and State law is involved. In this situation, "the well settled rule in this court is, that the courts of the United States adopt and follow the decisions of the State courts in questions which concern merely the Constitution and laws of the State." *Luther v. Borden,* 7 How. 1, 40. The rule thus stated has often been

reiterated and applied as, for example, in *King v. Order of United Commercial Travelers,* 333 U.S. 153; *American Federation of Labor v. Watson,* 327 U.S. 582; *Huddleston v. Dwyer,* 322 U.S. 232, 236; *Thornton v. Duffy,* 254 U.S. 361; *Pacific Gas & Elec. Co. v. Police Court,* 251 U.S. 22, 24; and *Wailes v. Smith,* 157 U.S. 271.

B. The decision of the California Supreme Court is not here reviewable as an alleged violation of the constitutional guarantee to the States of a republican form of government; nor does it deny to petitioners any right they have under any other provision of the Federal Constitution or statutes.

The principal ground for review urged by petitioners is an alleged violation of the guarantee to the states of a republican form of government, embodied in Article IV, Section 4, of the Federal Constitution. The claim is without merit. The holding of this Court in 1849 in *Luther v. Borden,* 7 How. 1, that the constitutional guarantee of a republican form of government to the states is political and not justiciable has been uniformly followed in a wide variety of subsequent decisions. Thus, in *Taylor v. Beckham,* 178 U.S. 548, a petition for a writ of error to review the decision of the Kentucky Court of Appeals in an action to determine the right to the governorship was denied and the contention of the petitioners that Federal jurisdiction could be grounded in Article IV, Section 4, was rejected. In *Marshall v. Dye,* 231 U.S. 250, supra, a writ of error to review a state court decree enjoining the submission of a constitution for ratification by the voters of Indiana was denied for

want of jurisdiction and the contention that the judgment of the state court contravened Article IV, Section 4, was rejected as presenting no justiciable controversy.

In *Pacific States Telephone & Telegraph Co. v. Oregon,* 223 U.S. 118, and in *Kiernan v. Portland,* 223 U.S. 151, the claim that the initiative process itself involved a breach of the guarantee of Article IV, Section 4, was rejected on the same ground.[7] Surely, if the broad grant by a state constitution of the right of initiative presents no justiciable controversy, neither does a limitation upon that right.

Petitioners' attempt to raise a Federal question by resort to the Ninth and Tenth Amendments to the Constitution (not urged upon the court below) is without substance. It is elementary that these amendments express inherent limitations upon the Federal government, not upon the government of any of the several states. Petitioners' effort here to invoke these amendments is aimed against action of the State government, or of a portion thereof, and not against the exercise of any Federal power. Equally without substance are petitioners' efforts to anchor a Federal question in 28 U.S.C.A., Section 1257, which merely states the grounds upon which certiorari will lie to a state court, or in 8 U.S.C.A., Section 43, the Civil Rights Act. These statutes provide for jurisdiction and for remedies. Neither establishes any substantive

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[7]The same claim as to the referendum process was rejected on the same ground in *Ohio ex rel. Davis v. Hildebrand,* 241 U.S. 565.

rights, privileges or immunities. They could not, nor do they purport to, create any substantive Federal rights not grounded in the Constitution of the United States. And petitioners show no violation of any constitutional guarantee.

IV. CONCLUSION.

The petitioners lack the requisite interest to invoke the jurisdiction of this Court in this matter. The people of the State of California, by their recent amendment of their constitution, have effectively precluded petitioners from imposing petitioners' measure upon them. In any event, petitioners present no Federal question. Therefore, the petition for certiorari should be denied.

Dated, San Francisco, California,
February 9, 1949.

Respectfully submitted,

STANLEY A. WEIGEL,
LANDELS AND WEIGEL,
Counsel for Respondent McFadden.

(Appendix Follows.)

Portions of the Constitution of the State of California Deemed to Have An Important Bearing.

Constitution of California, Article IV, Section 1:

"Section 1. The legislative power of this State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the legislature."

*   *   *   *   *   *   *

". . . Upon the presentation to the Secretary of State of a petition certified as herein provided to have been signed by qualified electors, equal in number to 8 per cent of all the votes cast for all candidates for Governor at the last preceding general election, at which a Governor was elected, proposing a law or amendment to the Constitution, set forth in full in said petition, the Secretary of State shall submit the said proposed law or amendment to the Constitution to the electors at the next succeeding general election occurring subsequent to 130 days after the presentation aforesaid of said petition, or at any special election called by the Governor in his discretion prior to such general election . . ."

*   *   *   *   *   *   *

"Any act, law or amendment to the Constitution submitted to the people by either initiative or referendum petition and approved by a majority

of the votes cast thereon, at any election, shall take effect five days after the date of the official declaration of the vote by the Secretary of State."

* * * * * * *

"If for any reason any initiative or referendum measure, proposed by petition as herein provided, be not submitted at the election specified in this section, such failure shall not prevent its submission at a succeeding general election, . . ."

Constitution of California, Article IV, Section 1c:

"Sec. 1c. Every constitutional amendment or statute proposed by the initiative shall relate to but one subject. No such amendment or statute shall hereafter be submitted to the electors if it embraces more than one subject, nor shall any such amendment or statute embracing more than one subject, hereafter submitted to or approved by the electors, become effective for any purpose." (Initiative constitutional amendment adopted November 2, 1948, effective December 15, 1948.)

Constitution of California, Article XVIII, Section 2:

"Sec. 2. Whenever two-thirds of the members elected to each branch of the Legislature shall deem it necessary to revise this Constitution, they shall recommend to the electors to vote at the next general election for or against a convention for that purpose, and if a majority of the electors voting at such election on the proposition for a convention shall vote in favor thereof, the Legislature shall, at its next session, provide by

law for calling the same. The convention shall consist of a number of delegates not to exceed that of both branches of the Legislature, who shall be chosen in the same manner, and have the same qualifications, as members of the Legislature. The delegates so elected shall meet within three months after their election at such place as the Legislature may direct. At a special election to be provided for by law, the Constitution that may be agreed upon by such convention shall be submitted to the people for their ratification or rejection, in such manner as the convention may determine. The returns of such election shall, in such manner as the convention shall direct, be certified to the executive of the State, who shall call to his assistance the Controller, Treasurer, and Secretary of State, and compare the returns so certified to him; and it shall be the duty of the executive to declare, by his proclamation, such Constitution, as may have been ratified by a majority of all the votes cast at such special election, to be the Constitution of the State of California."

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1948

No. 446

WILLIS ALLEN, ROY G. OWENS, and CAMPAIGN COMMITTEE FOR CALIFORNIA BILL OF RIGHTS INITIATIVE CONSTITUTIONAL AMENDMENT, INC., a corporation,
Petitioners,

v.

ARTHUR JAMES McFADDEN and FRANK M. JORDAN as Secretary of the State of California,
Respondents.

ON CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

BRIEF OF RESPONDENT JORDAN IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. STATEMENT OF THE CASE

The respondent Frank M. Jordan is the Secretary of State of the State of California, and appearance is made on his behalf by the Attorney General of that State.

The petitioners have requested a writ of certiorari to the California Supreme Court to review a peremptory writ of mandate in the case of *McFadden* v. *Jordan*, order dated September 3, 1948, opinion dated

August 3, 1948, and reported at 32 Adv. Cal. Reports, page 355 (196 Pac. 2d (Adv.) 787). The case was an original mandamus proceeding in the California Supreme Court instituted by McFadden, one of the respondents herein, to restrain the respondent Frank M. Jordan, as Secretary of State, from certifying an initiative measure for the ballot at the November, 1948, general election. The petitioners herein, as sponsors of the initiative proposal, intervened in that case to resist the issuance of the writ of mandate.

In view of the inaccuracies resulting from the incorporation of argumentative material in petitioners' statement of the case, we deem it necessary to set forth an additional statement, pursuant to Section 4 of Rule 27 of the court.

Pursuant to Article IV, Section 1, of the California Constitution, petitioners circulated an initiative petition proposing a number of amendments to the State Constitution. The initiative proposal bore the official designation: "Taxes, Gambling, Pensions, Etc. Initiative Constitutional Amendment." (Transcript of Record, pp. 14-30) and received sufficient electoral signatures to quality for the ballot at the November general election.

The California Supreme Court held that the initiative power reserved to the people by Article IV, Section 1, of the State Constitution applies only to the proposing and adopting or rejecting of "laws and amendments to the Constitution" and does not purport to extend to a constitutional revision. (Tran-

script of Record, p. 114.) The court determined that the measure proposed so many and such substantial changes in the State Constitution as to amount to a revision, rather than an amendment, of that organic law. The court stated that such a revision, as a single measure, could be submitted to the electorate only pursuant to a constitutional convention called pursuant to Article XVIII, Section 2 of the State Constitution. The basic method of revision through a constitutional convention, the court said, was not dispensed with by the initiative provisions of the Constitution. (Transcript of Record, pp. 131-132.) Accordingly, the court issued a peremptory writ restraining this respondent from certifying the initiative proposal for the ballot.

It is now settled in California that the courts possess the power by writ of mandate, to restrain the Secretary of State from submitting invalid initiative measures to the electors.

> *Boyd* v. *Jordan,* 1 Cal. 2d 468 (35 Pac. 2d 533);
> *Clark* v . *Jordan,* 7 Cal. 2d 248 (60 Pac. 2d 457, 106 ALR 549);
> *Epperson* v. *Jordan,* 12 Cal. 2d 61 (82 Pac. 2d 445).

At the general election of November 2, 1948, the California electors approved and adopted the following amendment to Article IV of the State Constitution:

> "Sec. 1c. Every constitutional amendment or statute proposed by the initiative shall relate to but one subject. No such amendment or statute

> shall hereafter be submitted to the electors if it embraces more than one subject, nor shall any such amendment or statute embracing more than one subject, hereafter submitted to or approved by the electors, become effective for any purpose."

Not being a part of the State Constitution at the time of the decision below, the above quoted provision was not a factor in arriving at that decision. We refer to it for a purpose which will be made apparent in the course of our argument.

II. ARGUMENT

Summary of the Argument

A. The court lacks jurisdiction because the questions presented are of a state and local character.

B. The court should not accept jurisdiction because of want of merit in the federal questions relied upon.

A. THE COURT LACKS JURISDICTION BECAUSE THE QUESTIONS PRESENTED ARE OF A STATE AND LOCAL CHARACTER

The petitioners' appeal to the jurisdiction of the court consists of a strange admixture of state and federal questions, interwoven with each other and with miscellaneous hyperbolic references to tyranny, judicial encroachments and infringements of democracy. Considered as a question of law, rather than an ideological appeal, the petition should be dismissed, either because there is no power in this court to re-examine the decision of the state court, or because of a want of merit in the federal questions relied upon.

While, to the superficial eye, petitioners' attack is aimed at the decision of the court below, the actual objective of the attack is the California Constitution as interpreted and applied by the Supreme Court of the State. In reviewing the decision of a state court, the Federal Supreme Court must accept the state tribunal's decision as to the meaning of the state constitution and is concerned solely with the effect and operation of the law as placed in force in the state. *(Thornton* v. *Duffy,* 245 U. S. 361; *Corn Products Refining Co.* v. *Eddy,* 249 U. S. 427.) The question then is not whether the decision of the court below is violative of federally-protected rights, but whether the initiative provisions of the California Constitution, as interpreted by the state court, are violative of those rights. Seen in this light, the question must be answered in the negative.

Suffrage is not attached to the individual as an inherent or natural right, but is an incident of state citizenship. In our federal system the electoral franchise does not have its source in the Federal Constitution, but instead is a privilege conferred by each state upon its own inhabitants, conditioned by definitions and qualifications expressed in state law and subject only to the requirements of the Fifteenth and Nineteenth Amendments that the right to vote shall not be abridged on account of race, color, previous condition of servitude or sex. *(United States* v. *Cruikshank,* 92 U. S. 542; *Guinn* v. *United States,* 238 U. S. 347; *Myers* v. *Anderson,* 238 U. S. 368.) Closely akin

to the electoral privilege, is the power of the citizens of some of the states to initiate direct legislation. The initiative power is a creature of state, not federal, law.

The initiative power was nonexistent in this country for 109 years following the establishment of the Federal Government. In 1898, South Dakota was the first state to adopt the initiative. *(The Book of the States* (Council of State Governments, Chicago, 1948), p. 155.) The initiative was established in California in 1911, through an amendment of the State Constitution. Approximately twenty out of the forty-eight have adopted the state-wide initiative. Additional states permit the initiative only at the county and city levels, while others have adopted the referendum only. *(Ibid,* pp. 155-160.) In the absence of a state provision authorizing the exercise of the initiative power, the power is nonexistent.

State v. *Hall,* 35 N. D. 34 (159 N. W. 281;
White v. *Welling,* 89 Utah 335 (57 Pac. 2d 703).

Under the circumstances, there is no conceivable basis for petitioners' argument that the power of California citizens to legislate or amend the State Constitution via the initiative is a right, privilege, or immunity guaranteed by any provision of the Federal Constitution or laws. A state may grant or withhold the initiative power, or through its courts chip away or undermine the power, without transgressing any federally protected right. Questions involving the construction and application of the initiative provisions of a state constitution are of a local and state

character and will not support a writ of error from the Federal Supreme Court to a state court.

Kiernan v. *Portland,* 223 U. S. 151.

The decision of the court below was concerned solely with the meaning and application of Article IV, Section 1, and Article XVIII, Section 2, of the California Constitution. The Federal Supreme Court cannot review a state court's construction of the constitution and laws of the State. *(Columbus Southern R. Co.* v. *Wright,* 151 U. S. 470; *Bi-Metallic Inv. Co.* v. *State Board of Equalization,* 239 U. S. 441.) Whether a state has, by its constitution, bestowed upon its people any particular part of the legislative power is a question of state law, a decision of which by the highest state court is conclusive on the subject.

Ohio ex rel. Davis v. *Hildebrant,* 241 U. S. 565.

We refer to Section 1c of Article IV of the California Constitution, which was adopted by the voters on November 2, 1948, (statement of the case, supra) and which hereafter limits state-wide initiatives to a single subject matter. This constitutional provision would obviously inhibit initiatives such as the hydra-headed proposal now before the court. Is this new provision of the State Constitution violative of any Federal right, privilege or immunity? If it is not, neither is the decision of the State Supreme Court which is here assailed by petitioners.

The only question before the court below was whether the California Constitution conferred upon

the people the power to exercise the particular manifestation of the initiative process attempted by petitioners. The inquiry was strictly a question of state constitutional law. It is respectfully submitted that the decision of the California Supreme Court on the question is conclusive and forecloses any inquiry by the Federal Supreme Court.

B. THE COURT SHOULD NOT ACCEPT JURISDICTION BECAUSE OF WANT OF MERIT IN THE FEDERAL QUESTIONS RELIED UPON

Upon a writ of certiorari to a state court, the right, privilege or immunity claimed under the Federal Constitution or laws must be specially claimed or set up in the court below to give the Supreme Court jurisdiction. (28 U. S. C. A., Sec. 1257, par. (3); *Cleveland, etc. R. Co.* v. *Cleveland,* 235 U. S. 50.) The Supreme Court acquires no jurisdiction unless the presentation of the federal question affirmatively appears upon the face of the record. *(Whitney* v. *California,* 274 U. S. 357.) The assertion of the claim must be made unmistakably and not left to inference. *(Michigan Sugar Co.* v. *Michigan,* 185 U. S. 112.)

An examination of the record below discloses that the intervenors (petitioners herein) asserted federal questions at only one point in the state court proceeding, in a supplemental memorandum of points and authorities. The only federal grounds urged were those allegedly arising under Article IV, Section 4, of the Federal Constitution and Section 1979, Revised Statutes (8 U.S.C.A., Sec. 43). (Transcript of Record, pp. 108-111.) The alleged invasion of rights arising

under the Ninth and Tenth Amendments is urged for the first time in the petition for certiorari in this court. Not having raised these Federal questions in the court below, petitioners are without standing to assert them here.

However this may be, petitioners' resort to the Ninth and Tenth Amendments is ill-taken. They contend that the decision of the court below is a judicial encroachment upon sovereign legislative functions reserved to the citizens of the state, thus violating the principle of separation of powers. Brief of Petitioners, pp. 16-17.) From this point, the argument branches in two directions. First, they assert that this judicial encroachment is violative of the Ninth and Tenth Amendments.* Petitioners bottom this assertion upon the supposed existence of a vast residuum of undefined and indefinable "rights" (including the right to initiate direct legislation), which are not delegated to the Federal Government, which are retained by or reserved to the people (as distinguished from the states), and which are protected from state action by the Ninth and Tenth Amendments. These amendments, according to petitioners, confirm in the people of each state whatever sovereign rights are reserved to them by their respective state constitutions. This argument is conceived out of thin air and begotten stillborn. It is hornbook law that the Ninth

* The Ninth Amendment declares: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

The Tenth Amendment provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

and Tenth Amendments do not limit the powers of the states in respect to their own people, but operate upon the Federal Government only. (*Lessee of Livingston* v. *Moore,* 32 U. S. (7 Pet.) 469; *McElvain* v. *Brush,* 142 U. S. 155; *Brown* v. *New Jersey,* 175 U. S. 172.) These amendments define the relationship of the Federal Government to the states and to the people, but do not regulate the relationship of a state to its own citizens. (See, *United States* v. *Darby,* 312 U. S. 100.) It is obvious that neither the decision of the court below nor the initiative provisions of the California Constitution, as construed and applied by that court, are violative of the Ninth or Tenth Amendments.

Secondly, they contend that this judicial restraint upon a legislative process is a departure from the republican form of government guaranteed by Section 4 of Article IV of the Federal Constitution. If the three powers of government in California are imperfectly separated, that is a matter of local, not federal, concern. (*Lessee of Livingston* v. *Moore,* supra, 32 U. S. (7 Pet.) 469.) If the California judiciary has so far intruded upon the legislative power that the state has lost its republican form of government, that is a question for Congress, not the Federal Supreme Court. (*Luther* v. *Borden,* 48 U. S. (7 How.) 1.) In the early days of the initiative and referendum, the power of direct legislation was attacked as violative of the republican form of government. In a series of decisions this court held that the question was

political and not a subject for judicial inquiry. (*Pacific States Tel. and Tel Co.* v. *Oregon,* 223 U. S. 118; *Kiernan* v. *Portland,* supra, 223 U. S. 151; *Ohio ex rel. Davis* v. *Hildebrant,* supra, 241 U. S. 565.) While petitioners' argument stands in refreshing contrast to these earlier assertions, it is equally groundless as an appeal to the exercise of jurisdiction by the court. If, in the light of Article IV, Section 4, a *grant* of the initiative power raises a political question, so does a *limitation* upon that power.

From their statement of the questions presented (Brief of Petitioners, p. 11) petitioners apparently attack the decision of the lower court on the basis of alleged "constitutional rights" guaranteed them by 28 U. S. C. A., Section 1257 (being a statement of the grounds upon which certiorari will lie to a state court) and 8 U. S. C. A., Section 43 (R. S. Sec. 1979; the Civil Rights Act). As is obvious from a reading of these statutes, they do not of themselves establish any substantive right, privilege or immunity, but are merely jurisdictional and procedural in nature. We have been unable to discover any case in which the Civil Rights Act has been used as the basis for the issuance of a writ of certiorari or writ of error from this court to a state tribunal. Considered substantively, the Civil Rights Act concerns only the rights, privileges and immunities of national citizenship secured by the Fourteenth Amendment, but does not include rights pertaining to state citizenship and derived solely from the relationship between the citizen

and his state established by state law. (*Snowden* v. *Hughes,* 321 U. S. 1; see, also, *Hague* v. *C.I.O.,* 307 U. S. 496.) Petitioners do not claim any violation of the Fourteenth Amendment, nor does any exist. If there be any violation, it is of a right of state citizenship and not of any right, privilege or immunity of national citizenship. The statutes relied upon by petitioners thus lend no support to their plea.

The federal questions urged by petitioners, may, in part, not be heard because not raised or considered in the state court. They are, as to all of them, devoid of merit.

III. CONCLUSION

This respondent urges that the questions presented by petitioners are of a purely state character, not federal, and that the petition for the writ of certiorari should be dismissed.

Respectfully submitted,

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Of Counsel:

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APPENDIX

California Constitution, Article IV, Section 1.

"The legislative power of this State shall be vested in a Senate and Assembly which shall be designated 'The Legislature of the State of California,' but the people reserve to themselves the power to propose laws and amendments to the Constitution, and to adopt or reject the same, at the polls independent of the Legislature, and also reserve the power, at their own option, to so adopt or reject any act, or section or part of any act, passed by the Legislature.

"The enacting clause of every law shall be 'The people of the State of California do enact as follows:'.

"The first power reserved to the people shall be known as the initiative. Upon the presentation to the Secretary of State of a petition certified as herein provided to have been signed by qualified electors, equal in number to eight percent of all the votes cast for all candidates for Governor at the last preceding general election, at which a Governor was elected, proposing a law or amendment to the Constitution, set forth in full in said petition, the Secretary of State shall submit the said proposed law or amendment to the Constitution to the electors at the next succeeding general election occurring subsequent to one hundred thirty days after the presentation aforesaid of said petition, or at any special election called by the Governor in his discretion prior to such general election. All such initiative petitions shall have printed across the top thereof in twelve-point blackface type the following: 'Initiative measure to be submitted directly to the electors.' * * *"

California Constitution, Article XVIII, Section 2.

"Whenever two-thirds of the members elected to each branch of the Legislature shall deem it necessary to revise this Constitution, they shall recommend to the electors to vote at the next general election for or against a Convention for that purpose, and if a majority of the electors voting at such election on the proposition for a Convention shall vote in favor thereof, the Legislature shall, at its next session, provide by law for calling the same. * * *"

United States Constitution, Article IV, Section 4

"1. The United States shall guarantee to every State in this Union a republican form of Government, and shall protect each of them against invasion; and on application of the Legislature, or of the executive (when the Legislature cannot be convened) against domestic violence."

U.S.C.A., Title 8, Section 43.

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

U.S.C.A., Title 28 Section 1257 (3)

"Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

"* * *

"(3) By writ of certiorari, where the validity of a treaty or statute of the United States is drawn in question or where the validity of a State statute is drawn in question on the ground of its being repugnant to the Constitution, treaties or laws of the United States, or where any title, right, privilege or immunity is specially set up or claimed under the Constitution, treaties or statutes of, or commission held or authority exercised under, the United States."

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